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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RAM PYARE SINGH, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	B289600 (Los Angeles County Super. Ct. No. BC645034)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Andrews & Hensleigh and Joseph Andrews for Plaintiff and Appellant.

Lynberg & Watkins, Pancy Lin, Ruben Escobedo III and Norman Watkins for Defendant and Respondent.

Dr. Ram Pyare Singh sued his former employer, The Regents of the University of California, for discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) after unsuccessfully challenging his termination in an internal University of California grievance procedure. Because Singh did not seek to set aside the adverse administrative determination through a petition for an administrative writ of mandate and appeal from any order on that petition, the superior court granted The Regents' motion for summary judgment on the ground Singh had failed to exhaust his judicial remedies. On appeal Singh argues the court erred in granting the motion because requiring exhaustion of judicial remedies is contrary to the legislative intent of FEHA; even if the defense might otherwise be available, he did not expressly agree to have his statutory claims decided in the administrative proceeding; and no binding effect should be given to the findings in the administrative proceeding because the hearing officer utilized a "but for" standard of causation that does not apply in FEHA actions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Singh's Employment at the University of California, Los Angeles*

Singh was initially hired by The Regents in 2000 as a senior post-doctoral scientist in the Department of Pathology and Lab Medicine and the Molecular and Medicinal Pharmacology Department at the University of California, Los Angeles (UCLA). In 2003 he was appointed assistant professor of research in UCLA's Department of Medicine, Division of Rheumatology. Singh was promoted to adjunct associate professor of medicine in 2009 and then in 2011 to adjunct professor in the Division of

Rheumatology. In each of these positions Singh was responsible for securing funding for his compensation and to support his research from internal grants and sources outside the University.

Throughout most of Singh's time in the Division of Rheumatology, the chief of the division was Dr. Bevra Hahn. In 2011 Dr. Hahn announced her retirement effective in the summer of 2012.

On May 27, 2011 Singh was advised in writing by Dr. Alan Fogelman, Executive Chair of UCLA's Department of Medicine, that his appointment would end on November 30, 2011 if he was unable to secure additional outside funding to support his position. Sometime prior to November 30, 2011 Dr. Hahn advised Dr. Fogelman that Singh would lose his retirement benefits, including health insurance benefits for his family, if his employment at UCLA ended before January 1, 2013 when Singh turned 50 years old. Dr. Fogelman agreed to do what he could to extend Singh's appointment at least through January 2, 2013.

In November 2011, with Dr. Hahn and Dr. Fogelman's support, Singh was granted $100,000 in bridge funding from UCLA's medical school. Singh's appointment was then extended until June 30, 2012. However, Singh was again advised he needed to secure additional funds if his appointment was to be extended beyond that date.

In April 2012 Singh sought further bridge funding from the medical school. On April 25, 2012 Singh met with Dr. Leonard Rome, an associate dean at the medical school, who suggested changes to Singh's draft letter seeking the second round of bridge funding. Dr. Rome told Singh there was no precedent for a second year of bridge funding but he was generally in support of Singh trying to get additional help in this manner. Singh then

went to Dr. Fogelman's office and presented the letter to him. Dr. Fogelman accused Singh of being dishonest for representing that Dr. Hahn had agreed to the funding request and had signed the letter electronically; Singh insists the letter was marked as a draft and he did not represent that Dr. Hahn had signed it.[1] Dr. Fogelman subsequently explained, although he was disturbed by Singh's apparent dishonesty, he had not initiated disciplinary action against Singh because of Dr. Fogelman's concern for Singh's family and his desire to allow Singh to remain employed until January 2013 when Singh would be eligible for retirement benefits.

On May 8, 2012 Dr. Fogelman emailed Dr. Rome, explaining he had decided it was not appropriate to provide further funding for Singh's position. His email, marked confidential, stated in part: "The Division of Rheumatology currently has *many* investigators that are in deficit that the [Department of Medicine] must support. We have not come to you for funding these investigators. Bevra [Hahn] is retiring on July 1, 2012 and we will be recruiting a new Division Chief which will require considerable investment in this Division. The question that I have asked myself in assessing Ram's request, 'Is it appropriate for us to expend further funds on an Adjunct faculty member whose team leader [Dr. Hahn] is retiring and thus, deprive the use of the funds to other young investigators starting their careers?' My answer to myself has been no, it is not appropriate."

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[1] According to Singh, he had used a prior letter, signed by Dr. Hahn, as a template for the new funding request, which is why her signature was on the draft.

Although Dr. Fogelman declined to support the requested second round of bridge funding, on May 10, 2012 Singh was advised in writing that he was being given a limited term appointment from July 1, 2012 through January 2, 2013. He was also told an extension of that appointment to June 30, 2013 might be considered if he obtained the necessary external funding.

In November 2012 Singh was advised he needed to secure approximately $87,000 in additional funding to continue his employment through June 2013. Singh and The Regents disagree whether Singh satisfied that threshold requirement. Regardless, Singh's appointment was thereafter extended to June 30, 2013 at 51 percent of his then-current compensation, a reduction in salary that permitted him to remain eligible for benefits. At about the same time Singh was advised he would not be granted an exception to the University's policy that an adjunct professor in Singh's position could not submit extramural grant applications as a principal investigator.

Singh's appointment was not renewed as of June 30, 2013, thereby terminating his employment.

2. *The Administrative Grievance Proceeding*

Immediately after the expiration of his appointment, Singh initiated an internal administrative grievance procedure at UCLA. The grievance proceeding was conducted over four days in October, November and December 2014 and was transcribed. Both sides (referred to by the hearing officer in her written decisions as the Grievant and the University) presented evidence, including witness testimony under penalty of perjury. Singh was represented by counsel during a portion of the hearing and for purposes of post-hearing briefing.

The parties stipulated to specific issues to be decided by the hearing officer. First, did the University violate Academic Personnel Manual Policy 137-30-c when it did not reappoint Singh to the position of adjunct professor of medicine on June 30, 2013? In addition to specifying procedural requirements relating to notice, that provision authorizes the University to decide not to renew a term appointment "when, in its judgment, the programmatic needs of the department or unit, lack of work, the availability of suitable funding for the position, or the appointee's conduct or performance, do not justify renewal of the appointment."

Second, did the University violate Academic Personnel Manual Policy 145 when Singh was required to take an involuntary reduction in his compensation from January 3, 2013 through June 30, 2013? Policy 145 specifies the University will provide equitable and consistent treatment for academic appointees, and states, "Good cause for layoff and involuntary reduction in time is established if the University's actions as determined by the University are based on budgetary reasons, lack of work, or programmatic needs."

Third, was Singh discriminated against based on his race or age in violation of Academic Personnel Manual Policy 35 when he was denied bridge funding in April 2012? Policy 35 prohibits discrimination against, or harassment of, any person employed or seeking employing with the University of California on the basis of race, color, national origin, religion, sex, gender, gender expression, gender identity, pregnancy, physical or mental disability, medical condition, genetic information, ancestry, marital status, age, sexual orientation, citizenship or service in the uniformed services. Policy 35 specifies it "is intended to be

consistent with the provisions of applicable State and Federal laws and University policies."[2]

The hearing officer issued a 37-page recommended decision on July 20, 2015 and a 14-page supplemental recommended decision on September 10, 2015. In her recommended decision the hearing officer found not supported by the evidence Singh's contention that the decision not to extend his appointment past June 30, 2013 was based on Dr. Fogelman's ill will toward him, not on fiscal concerns. To the contrary, the hearing officer expressly found the decision not to reappoint Singh "was based upon a lack of suitable funding." As she explained, "[T]he decisions that were made regarding the appointment of the Grievant also were made in the context of a harsh economic climate resulting from the recession of 2008, whose ramifications still were being felt by the University years later."[3]

The hearing officer further found that the reduction of Singh's compensation to 51 percent as of January 3, 2013 was also based on budgetary reasons. According to her findings, "The University had projected that the Grievant would continue to run a deficit if his appointment was extended from January 3, 2013,

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[2] Policy 35 also prohibits retaliation against any employee or person seeking employment for bringing a complaint of discrimination or harassment. Singh's grievance included claims of retaliation that the hearing officer and Vice Chancellor rejected and were not repeated in Singh's FEHA complaint.

[3] Discussing Dr. Fogelman's determination that Singh had been dishonest when showing him the letter regarding a second round of bridge funding with Dr. Hahn's name on it, the hearing officer found there was no basis in the evidence to conclude the letter "clearly was a draft," as Singh asserted.

to the end of the fiscal year on June 30, 2013. Notwithstanding the foregoing, Dr. Fogelman, in consultation with Dean Hiatt, decided to approve the extension, albeit on a reduced time basis, in order to fund his salary and benefits with funds that were already on hand, so as to not run an even larger deficit."

With respect to Singh's efforts to obtain outside funding as the termination date for his appointment neared, the hearing officer accepted the testimony of Dr. Fogelman that, if a principal investigator runs a deficit when doing research, as the evidence established was the situation with Singh, the shortfall must be covered by the University. It was for that reason, the hearing officer found, Dr. Fogelman made the decision in January 2013 to no longer grant Singh an exception that would have permitted him to apply for funds as if he were a principal investigator.

In her supplemental recommended decision the hearing officer found Singh had failed to establish a prima facie case of discrimination based on race with respect to the denial of a second round of bridge funding, specifically concluding that Singh had not been treated differently from similarly situated employees.

Referring to Dr. Fogelman's May 8, 2012 email to Dr. Rome in which Dr. Fogelman discussed the desirability of funding "young investigators starting their careers," however, the hearing officer found it "clear that age was a factor that was taken into account when the decision was made to not provide additional bridge funding to the Grievant for the period July of 2012 through July of 2013." Nonetheless, the hearing officer also found that additional factors played a significant role. As she had discussed in connection with the decision not to reappoint Singh in June 2013, "Dr. Fogelman believed that Grievant had

not been honest when he had shown him a letter in support of such funding that allegedly had been written and/or authorized by Dr. Hahn; in addition, the Grievant had been running a deficit, due to his inability to secure adequate extramural funds to cover his expenses, including his salary and fringe benefits." Based on that evidence, the hearing officer found "the perceived dishonesty of the Grievant, and fiscal concerns relating to the ongoing deficit that he had been running, were major factors that Dr. Fogelman took into account in deciding to deny the request for funding; in addition there was no precedent for granting a second round of bridge funding." The hearing officer thus concluded although age was a factor, Singh failed to prove that but for the consideration of his age, he would have received additional bridge funding.

In sum, the hearing officer recommended that all of Singh's claims be denied. The hearing officer's findings and recommendations were reviewed and upheld by Carole Goldberg, UCLA's Vice Chancellor, Academic Personnel, in a written decision on December 18, 2015.

3. *Singh's FEHA Complaint*

Singh received a right to sue notice from the Department of Fair Employment and Housing (DFEH) on December 30, 2015. On December 23, 2016 he filed an unverified complaint for damages against The Regents and 50 Doe defendants, alleging four causes of action: discrimination in violation of FEHA; associational discrimination in violation of FEHA; failure to take reasonable steps to prevent discrimination in violation of FEHA; and wrongful termination in violation of FEHA. In essence, Singh alleged the denial of his April 2012 request for bridge funding, the reduction in his compensation to 51 percent for the

period January 3 through June 30, 2013, the refusal to permit him to apply for external funding and the failure to renew his appointment beyond June 30, 2013 were all adverse employment actions substantially motivated by Singh's age, his ethnic or national origin and his association with Dr. Hahn, who was over the age of 40. Singh also alleged supervisory and managerial personnel at UCLA were aware that unlawfully motivated adverse employment actions were being taken against him but failed to take any meaningful steps to investigate, prevent or remedy the discrimination against him.

In his complaint Singh sought compensatory damages for past and future lost wages and benefits, as well as damages for mental pain and emotional distress. He also requested attorney fees.

The Regents answered the complaint with a general denial and asserted 29 affirmative defenses. The seventh affirmative defense alleged Singh's claims were barred by his failure to exhaust "available and/or required administrative and/or judicial remedies." The 25th affirmative defense alleged, "By reason of a prior adjudication, [Singh] is collaterally estopped from proceeding in this action."

4. *The Regents' Motion for Summary Judgment*

The Regents moved for summary judgment, asserting Singh's entire complaint was barred by his failure to exhaust judicial remedies following the adverse determination in the UCLA internal grievance proceeding and, alternatively, on the ground Singh could not establish a prima facie case for discrimination or establish The Regents' legitimate, nondiscriminatory reasons for its employment actions were pretextual.

Singh opposed the motion, arguing, in part, the internal grievance proceeding did not have a binding effect because it did not involve the same issues as raised by his complaint and, in addition, he did not have explicit notice that by participating in the proceeding he was placing his statutory claims at issue. Singh also argued the evidence provided by The Regents in support of its motion and the evidence submitted with his opposition contained both direct and circumstantial evidence of discrimination.

The superior court, relying on *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, granted The Regents' motion, ruling the adverse outcome of the administrative grievance proceeding was binding with respect to Singh's FEHA claims because he had failed to exhaust judicial remedies by challenging the findings in a mandate action in the superior court. The court did not address The Regents' alternate ground for its motion.[4]

Singh filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant may bring a motion on the ground there is a complete defense to the action or the plaintiff cannot prove one of the required elements of the case. (Code Civ. Proc., § 437c,

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[4] The court declined to rule on The Regents' evidentiary objections to Singh's opposition papers as "immaterial to the disposition of the motion."

subds. (o)(1), (2), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) We review a grant of summary judgment de novo and, viewing the evidence in the light most favorable to the nonmoving party (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618), decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

2. *The Doctrine of Exhaustion of Judicial Remedies*

Employees who believe they have suffered discrimination at the hands of their employers and wish to file civil claims for damages under FEHA must first exhaust their administrative remedies by filing a complaint with the DFEH and obtaining a right-to-sue notice. (Gov. Code, §§ 12960, 12965; see, e.g., *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72, 83; *Basurto v. Imperial Irrigation Dist.* (2012) 211 Cal.App.4th 866, 879.) Employees also may, but are not required to, pursue internal administrative remedies offered by their employer. (See *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 113 (*McDonald*); *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1092 [municipal employee need not exhaust city's internal remedies prior to filing a complaint with the DFEH].) However, if an employee voluntarily elects to first seek relief through the employer's internal procedures, he or she must fully exhaust that avenue of relief, completing not only the administrative procedures themselves, but also the available judicial remedies—petitioning for an administrative writ of mandate and appealing any order on that petition.

Unless challenged and set aside in a timely mandamus proceeding, adverse quasi-judicial administrative findings will be binding in the employee's subsequent lawsuit asserting FEHA and FEHA-related nonstatutory claims in accordance with general principles of issue preclusion (collateral estoppel). (*McDonald, supra*, 45 Cal.4th at p. 113 ["Once a decision has been issued, provided that decision is of a sufficiently judicial character to support collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. [Citation.] Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims"]; see *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at p. 76 ["[w]e conclude that when, as here, a public employee pursues administrative civil service remedies, receives an adverse finding, and fails to have the finding set aside through judicial review procedures, the adverse finding is binding on discrimination claims under FEHA"]; *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at pp. 1090-1091 [by requiring plaintiff to set aside adverse adjudicatory findings in mandamus proceeding before pursuing a civil action, "*Johnson* . . . ensures that employees who choose to utilize internal procedures are not given a second 'bite of the procedural apple'"].)

"This requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies. [Citation.] Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation.] Exhaustion of *judicial* remedies, on the

other hand, is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.'" (*Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at p. 70; see *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 876 ["unless a party to 'a quasi-judicial administrative agency proceeding' exhausts available judicial remedies to challenge the adverse findings made in that proceeding, those findings may be binding in later civil actions"].) "Generally speaking, if a complainant fails to overturn an adverse administrative decision by writ of mandate, 'and if the administrative proceeding possessed the requisite judicial character [citation], the administrative decision is binding in a later civil action brought in superior court.'" (*Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 773 (*Runyon*).)

3. *FEHA Plaintiffs Are Not Exempt from the Requirement of Judicial Exhaustion*

In *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963 (*Arbuckle*), a case involving alleged retaliation against a state employee for making a protected disclosure under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.), after discussing the general doctrine of exhaustion of judicial remedies, the Supreme Court cautioned, """[A] court may not give preclusive effect to the decision in a prior [administrative] proceeding if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged."""" (*Arbuckle*, at p. 976.) The specific statutory language at issue in *Arbuckle* was Government Code section 8547.8, subdivision (c), which provided

in part, "[A]ny action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a), and the board has issued, or failed to issue, findings pursuant to Section 19683." Parsing that language, the Court explained the Legislature had expressly acknowledged the existence of the administrative remedy, but "[i]t did not require that the board's findings be set aside by way of a mandate action; rather, it gave as the only precondition to the damages action authorized in section 8547.8(c), that a complaint be filed with the board and that the board 'issue[], or fail[] to issue, findings.' [Citation.] The bareness of this statutory language suggests that the Legislature did not intend the State Personnel Board's findings to have a preclusive effect against the complaining employee." (*Arbuckle*, at p. 976.)

In *Runyon*, *supra*, 48 Cal.4th 760, a whistleblower retaliation action involving a California State University (CSU) employee, the Court applied its *Arbuckle* analysis to Government Code section 8547.12, subdivision (c).[5] "Like the parallel provision addressed in *Arbuckle*, section 8547.12, subdivision (c) authorizes a damages action by an alleged whistleblower

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[5] Government Code section 8547.12, subdivision (c), states, in part, "[A]ny action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the trustees. Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months."

whenever the employee has exhausted his or her internal remedies by filing an internal complaint with CSU and CSU has reached an adverse decision, i.e. has failed to 'satisfactorily address' the employee's complaint. As in section 8547.8, the Legislature 'expressly acknowledged the existence of the parallel administrative remedy' yet 'did not require that the [administrative] findings be set aside by way of a mandate action . . . .' [Citation.] As in *Arbuckle*, then, to hold an adverse administrative finding preclusive in the expressly authorized damages action would be contrary to the legislative intent." (*Runyon*, at p. 774.) The *Runyon* Court explained that interpreting both Government Code sections 8547.8 and 8547.12 as requiring an employee to submit his or her complaint to a nonbinding administrative investigative procedure was "neither irrational nor particularly unusual." (*Runyon*, at pp. 774-775.) "Even if it does not produce a judicially binding determination, CSU's internal investigation of a whistleblower complaint, like that of the State Personnel Board under section 8547.8, is more likely to promote early and less costly resolution of complaints than permitting an alleged whistleblower to bring a damages action without exhausting administrative remedies." (*Id.* at p. 775.)

In *Taswell v. Regents of University of California* (2018) 23 Cal.App.5th 343, our colleagues in Division Three of the Fourth Appellate District considered the case of a University of California employee who had filed a lawsuit for, among other causes of action, retaliation in violation of Government Code section 8547.10, a statute that, along with Government Code sections 8547.8 and 8547.12, considered in *Arbuckle* and *Runyon*, is part of the California Whistleblower Protection Act.

Section 8547.10, subdivision (c), provides in its final two sentences, "[A]ny action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents. Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months." The *Taswell* court noted that the last sentence in section 8547.10, subdivision (c), which was added by a 2010 amendment, "is now identical to the language of subdivision (c) of Government Code, section 8547.12, governing CSU employees," at issue in *Runyon*. (*Taswell*, at p. 356.) Because the language in section 8547.12, subdivision (c), is identical to that found in section 8547.10, subdivision (c), the court held Taswell was not required to exhaust judicial remedies and challenge the administrative decision denying his claim he had been retaliated against for whistleblowing as a prerequisite to filing his lawsuit: "[H]is claim was neither limited by the administrative decision nor otherwise barred by the doctrines of res judicata or collateral estoppel." (*Taswell*, at p. 357.)

The *Taswell* court also held the plaintiff's causes of action for retaliation in violation of Health and Safety Code section 1278.5, regarding whistleblower reports concerning patient safety, Labor Code section 1102.5, regarding whistleblower reports concerning employee safety, and Government Code section 12653, part of the False Claims Act, were not barred by his failure to exhaust judicial remedies or by application of the doctrine of claim or issue preclusion. (*Taswell*,

supra, 23 Cal.App.5th at pp. 359-362.) The court explained the Supreme Court in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655 (*Fahlen*) had held Health and Safety Code section 1278.5 includes terms indicating the Legislature's understanding a medical staff member's whistleblower suit might begin and continue while the hospital's proceedings against the physician were still pending. (*Taswell*, at p. 360, quoting *Fahlen*, at p. 661.) Moreover, *Taswell* continued, the *Fahlen* Court held conditioning a whistleblower's retaliation lawsuit on a prior successful mandamus challenge to a hospital's quasi-judicial decision to restrict or terminate the whistleblower's medical staff privileges would seriously undermine the Legislature's purpose to afford the whistleblower the right to sue because the question of the physician's professional fitness at issue in a quasi-judicial peer review proceeding was distinct from the question whether retaliation was the actual reason for the exclusionary effort. (*Taswell*, at p. 661.) The *Taswell* court then held the *Fahlen* reasoning applied equally to whistleblower retaliation claims under the other two statutes before it. (*Taswell*, at pp. 361-362.)[6]

Contrary to Singh's argument, none of these whistleblower retaliation cases excuses his failure to exhaust judicial remedies with respect to his FEHA causes of action for discrimination and wrongful termination. As discussed, in *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at page 76 and *McDonald*, *supra*,

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[6] *Taswell* noted that employees of The Regents seeking to pursue a claim for damages in court for a violation of Labor Code section 1102.5 or Government Code section 12653 must exhaust administrative remedies before filing suit, citing *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 317. (*Taswell*, *supra*, 23 Cal.App.5th at p. 362.)

45 Cal.4th at page 113, both FEHA cases, the Supreme Court explained, although a party is not required as a matter of administrative exhaustion to begin an internal administrative grievance proceeding before filing the FEHA lawsuit, if he or she does, provided the administrative procedure is of a sufficient judicial character to support issue preclusion,[7] the prospective FEHA plaintiff must continue the process to completion, including exhaustion of available judicial remedies for reversal of adverse findings. Nowhere in *Arbuckle, Runyon* or *Fahlen* does the Supreme Court suggest its analyses of the whistleblower retaliation statutes before it, which contained language indicating the Legislature did not intend administrative findings be set aside in a mandate action, in any way affect the applicability of the judicial exhaustion doctrine in FEHA cases.

Singh's argument *Taswell*, *supra*, 23 Cal.App.5th 343 supports his view that judicial exhaustion is no longer applicable in FEHA cases is misplaced. In *Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, a FEHA action decided four weeks after *Taswell*, Justice Fybel,

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[7] The Supreme Court has explained that "[i]ndicia of [administrative] proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision." (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.) Singh does not contend UCLA's internal grievance proceeding was not sufficiently "judicial" for purposes of invoking the doctrines of exhaustion of judicial remedies and issue preclusion.

Taswell's author, distinguished *Arbuckle*'s holding that an adverse administrative finding had no preclusive effect against the complaining community college employee because *Arbuckle* (like *Runyon* and *Fahlen*) involved a whistleblower retaliation claim pursuant to a statute that indicated the Legislature did not intend for administrative findings to have a preclusive effect, not a FEHA discrimination claim. (*Wassmann*, at p. 844, fn. 2.)[8] And Justice Fybel went on to hold Wassmann's claims of race discrimination were barred because, even if properly raised in the administrative hearing considering her dismissal, "she failed to exhaust her judicial remedy because she did not raise racial discrimination in her petition for writ of mandate." (*Id.* at pp. 847-848; see *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 1144 ["[t]hough a public employee may choose to bypass the administrative process, if she pursues it through evidentiary hearings to a proposed decision, then she has the burden to exhaust administrative and judicial remedies notwithstanding the risk that a FEHA claim may no longer be viable"].)

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[8] The Supreme Court made a similar distinction in *Murray v. Alaska Airlines, Inc.*, *supra*, 50 Cal.4th at page 877, footnote 8, explaining the federal statute at issue in that case, unlike Government Code section 8547 (the whistleblower-protection statute considered in *Arbuckle*), had no language suggesting Congress intended that conclusive findings made by the United States Secretary of Labor in a final nonappealable order should not have preclusive effect in a subsequent state court action for wrongful termination.

4. *The Findings in Singh's Internal Grievance Proceeding Preclude Any Make-whole Recovery in His FEHA Lawsuit*

The denial of all of Singh's claims in the internal grievance proceeding included findings by the hearing officer, upheld by UCLA's Vice Chancellor, that the several employment-related decisions Singh contends in his lawsuit violated FEHA were in fact made for budgetary or other economic reasons. Specifically, the hearing officer found Singh had failed to establish his race was a factor in the April 2012 decision not to provide a second round of bridge funding for the period beginning July 2012. The hearing officer additionally found, although Singh's age was considered when making that decision, Singh's perceived dishonesty and fiscal concerns relating to his continuing inability to obtain sufficient outside funding to avoid deficits in his research program were the major factors in the decision. Thus, the hearing officer concluded, Singh had failed to prove that but for consideration of his age, he would have received additional bridge funding.

With respect to the reduction in his time and compensation to 51 percent in January 2013, the hearing officer again found this decision was made for budgetary reasons. The ongoing deficit in Singh's research efforts was also the reason that Dr. Fogelman made the decision in January 2013 to no longer grant Singh an exception that would have permitted him to apply for funds as if he were a principal investigator. Finally, the decision not to reappoint Singh after June 30, 2013 was based on a lack of suitable funding for the position.

These findings that The Regents' adverse employment actions were in fact taken for legitimate, nonpretextual, nondiscriminatory reasons necessarily mean Singh cannot

establish any of his FEHA claims for back pay, future lost wages or noneconomic damages. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*); see also *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-356; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 477.) Singh advances no valid reason why these findings, which resolved issues actually litigated and necessarily decided in the UCLA internal grievance proceeding, should not have preclusive effect. (See *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1090 ["[w]e serve judicial economy by giving collateral estoppel effect to appropriate administrative findings"]; *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at p. 76 ["when, as here, a public employee pursues administrative civil service remedies, receives an adverse finding and fails to have the finding set aside through judicial review procedures, the adverse finding is binding on discrimination claims under the FEHA"]; *Castillo v City of Los Angeles* (2001) 92 Cal.App.4th 477, 485 ["[i]f the administrative finding is upheld, or if it is never challenged judicially, it is 'binding on discrimination claims under the FEHA'"]; see also *Wassmann v. South Orange County Community College Dist.*, *supra*, 24 Cal.App.5th at p. 849 [Wassmann, "like the plaintiff in *Castillo*, had the opportunity to present evidence of unlawful discrimination to show the District's decision to dismiss her was without cause and the District's reasons were a pretext. Because the administrative law judge in this case, as his counterpart in *Castillo*, found there was cause to dismiss, the judge necessarily found that her dismissal was for proper reasons and not wrongful. . . . The administrative law judge's finding . . .

[was] binding on Wassmann's FEHA claims and could not be relitigated"].)[9]

a. *The absence of Singh's consent to have his FEHA claims adjudicated in the internal grievance proceeding does not limit the preclusive effect of the administrative findings*

Citing a number of decisions involving grievance procedures specified in collective bargaining agreements, Singh argues an administrative decision cannot have preclusive effect in a later FEHA action if the plaintiff had not clearly consented that FEHA statutory claims would be a subject of the proceeding. For example, in both *Ahmadi-Kashani v. Regents of University of California* (2008) 159 Cal.App.4th 449 and *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, the principal cases on which Singh relies, the court of appeal held the arbitration of a labor grievance, conducted pursuant to the terms of a collective bargaining agreement entered into between a union and an employer, could not be given binding effect in an employee's FEHA action unless the agreement expressly stated it intended to apply to such claims and provided a fair procedure for doing so.

The express agreement referred to in those cases, however, is the union's, not the individual employee's. As this court explained in *Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, "'Although ordinarily a presumption of

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[9] Issue preclusion (historically referred to as collateral estoppel) applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings LLC. v. Faerber* (2015) 61 Cal.4th 813, 825.)

arbitrability applies to contractual disputes arising out of a collective bargaining agreement, the presumption is not applicable to statutory violations. [Citation.] Indeed a requirement to arbitrate statutory claims "must be particularly clear." [Citation.] A union-negotiated waiver of employees' statutory rights to a judicial forum for claims of employment discrimination must be "'clear and unmistakable.'" [Citation.] . . . "[T]he right to a . . . judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a [collective bargain agreement].'" (*Id*. at p. 543.) Singh's contention he had to expressly agree the UCLA grievance procedure would have binding effect in his FEHA action is in no way supported by these cases.

Beyond the issue of consent, the character of the prefinding procedures—that is, the absence of a quasi-judicial administrative hearing—was of particular significance in these cases. As explained in *Ahmadi-Kashani*, "[I]f a party either participated in a quasi-judicial hearing, or was afforded the opportunity to do so as part of a mandatory administrative process, that process is considered her first 'suit,' and she is bound by its result. The exhaustion of judicial remedies rule provides she cannot pursue another remedy until she overturns the adverse result of the first suit. [¶] That did not happen in this case." (*Ahmadi-Kashani v. Regents of University of California*, *supra*, 159 Cal.App.4th at p. 461; see *Marcario v. County of Orange*, *supra*, 155 Cal.App.4th at pp. 399, 406-407 [distinguishing cases establishing that findings of an administrative agency, following its internal grievance procedure, are to be given binding effect because they involve findings made at a quasi-judicial hearing after which the employee would have a

right to petition the court for a writ of mandate]; see also *McDonald, supra*, 45 Cal.4th at pp. 113-114 ["[i]n the absence of quasi-judicial proceedings, [plaintiff] Brown was not required to seek judicial relief to set aside any findings or bear the consequences of their binding effect," citing *Ahmadi-Kashani*, at p. 461].)

The Supreme Court in *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th 61 considered and rejected the analogy Singh proposes between nonbinding outcomes in collective bargaining agreement/mandatory arbitration cases and the findings made in internal grievance proceedings that, as here, involve quasi-judicial administrative determinations. As the *Johnson* Court explained, in *Alexander v. Gardner-Denver Co*. (1974) 415 U.S. 36 [94 S.Ct. 1011, 39 L.Ed.2d 147] the United States Supreme Court had held an arbitrator's decision with respect to the nondiscrimination clause of a collective bargaining agreement is not binding on an employee's federal discrimination claim under title VII of the Civil Rights Act of 1964. However, "the arbitration was in the context of a collective bargaining agreement, which by its very nature gives rise to a tension between collective representation and individual statutory rights. [Citations.] This case involves neither mandatory arbitration nor collective bargaining." (*Johnson*, at pp. 75-76.) Neither does Singh's case.

b. *Use of a "but for" standard of causation with respect to Singh's age discrimination claim does not vitiate all preclusive effect of the hearing officer's findings*

In *Harris*, *supra*, 56 Cal.4th 203 the Supreme Court held a plaintiff in a FEHA discrimination action need not prove "but for" causation to establish liability. (*Harris*, at pp. 230-232.) But, the

Court also held, it is not enough for a plaintiff simply to prove the employer may have considered a prohibited criterion in the decisionmaking process. Rather, the plaintiff must show by a preponderance of the evidence that discrimination was a "substantial motivating factor" in the adverse employment action. (*Id*. at p. 232.)[10] As the Court explained, "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Ibid*.)

As discussed, although the hearing officer found Singh had failed to prove that race was a factor in the April 2012 decision to deny him a second round of bridge funding for the period July 1, 2012 to June 30, 2013—the first step in the chain of events that led to his separation from UCLA at the end of June 2013—she did conclude his age had been considered by Dr. Fogelman in

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[10] The *Harris* Court began its analysis by noting it was undisputed that a plaintiff must establish "a causal link between the employer's consideration of a protected characteristic and the action taken by the employer." (*Harris*, *supra*, 56 Cal.4th at p. 215.) What was disputed in the case was the kind or degree of causation required. (*Ibid*.) The answer, the Court held, was a plaintiff demonstrates the requisite causal link by showing discrimination to have been "a substantial factor motivating the employer's decision." (*Id*. at p. 229.)

making that decision. The hearing officer found, however, that Singh's perceived dishonesty and ongoing concerns regarding the deficits incurred by his research projects were the "major factors" in denying the funding request and that Singh had failed to prove that but for the consideration of his age, he would have received additional bridge funding.

Emphasizing the hearing officer's use of a "but for" standard rejected by the Supreme Court in *Harris*, Singh argues the hearing officer did not consider whether age was a substantial motivating factor in the adverse employment actions challenged in his FEHA lawsuit, even if those actions were also motivated by legitimate, nondiscriminatory budgetary concerns.[11] Accordingly, he contends, it was error to give her findings any preclusive effect.

Singh's argument fails to acknowledge the *Harris* Court's additional discussion of the issue of remedies in mixed motive cases. Where an employer's adverse employment action involves a combination of legitimate reasons and statutorily forbidden discrimination, but the employer proves it would have reached the same conclusion even absent the wrongful discriminatory motive, the Supreme Court held, the employee is not entitled to reinstatement, lost income or noneconomic damages that would

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[11] While not expressly addressing the substantial motivating factor standard established in *Harris*, the hearing officer did differentiate between Singh's age as "a factor," and his perceived dishonesty and the medical school's fiscal concerns as "major factors" in Dr. Fogelman's decision. That language suggests Singh's age was not a significant factor for Dr. Fogelman, who the hearing officer also found bore no individual animus toward Singh.

otherwise be available under FEHA. (*Harris*, *supra*, 56 Cal.4th at pp. 232-235.) "In the context of an allegedly unlawful termination, an order of reinstatement or backpay would not 'redress the adverse effects of [discriminatory] practices on aggrieved persons' [citation] if legitimate, nondiscriminatory reasons would have led the employer to terminate the employee in any event. Although such remedies might help to 'prevent and deter unlawful employment practices' [citation], they would do so only at the cost of awarding plaintiffs an unjustified windfall and unduly limiting the freedom of employers to make legitimate employment decisions. . . . The same is true with respect to any remedy for economic loss, such as front pay for loss of future income. Such an award would provide the plaintiff with an unjustified windfall." (*Id.* at p. 233.) Accordingly, in those cases where the employer proves it would have made the same decision at that time without considering the protected characteristic, the Court concluded, the worker's remedies are limited to injunctive and declaratory relief and, if the prevailing party, legal costs and fees. (*Id.* at pp. 234-235.)

As The Regents argues, the finding that age was not a but-for factor in the decision to deny Singh a second round of bridge funding is the equivalent of a finding that Dr. Fogelman would have made the same decision even if he had not considered Singh's age at all. Accordingly, while it is generally true that issue preclusion does not apply when the factual finding in the prior proceeding was based on a lower standard of proof than the one required in the subsequent proceeding (see, e.g., *Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 919), this more limited finding is properly given preclusive effect in Singh's FEHA lawsuit. As such, Singh is not entitled to the

make-whole remedies—compensatory damages including lost wages and benefits and damages for emotional distress—he seeks in this action. (See *Harris*, *supra*, 56 Cal.4th at pp. 234-235; see also CALJIC No. 2512 [Limitation on Remedies—Same Decision].)[12]

In sum, even though the hearing officer did not use a substantial motivating factor analysis, the trial court properly concluded The Regents was entitled to summary judgment in light of Singh's failure to exhaust judicial remedies to set aside her adverse findings.

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[12] Singh's complaint does not request either declaratory or injunctive relief. Although Singh prays for attorney fees and costs, he must be the prevailing party to receive such an award. (Gov. Code, § 12965, subd. (b); see *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984.) "Because FEHA does not define the term 'prevailing party,' prevailing party status is determined in this context 'based on an evaluation of whether a party prevailed "'on a practical level."' . . . In applying this standard, the trial court must identify the prevailing party 'by analyzing the extent to which each party has realized its litigation objectives.'" (*Bustos v. Global P.E.T., Inc.* (2017) 19 Cal.App.5th 558, 562-563.) Having sought only damages in his complaint, Singh could not achieve any of his litigation objectives and would not be entitled to fees and costs.

DISPOSITION

The judgment is affirmed. The Regents is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

FEUER, J.

DILLON, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.